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In The

Supreme Court of the United States

October Term, 1976

No. 76-1781

HARVEY A. LEVE and WILLIAM H. QUASHA, d/b/a Quasha Law Office,

Petitioners,

vs.

SCHERING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Harvey A. Leve and William H. Quasha, d/b/a Quasha Law Office, respectfully pray that a writ of certiorari issue to review the judgment-order entered in this proceeding on March 14, 1977 by the United States Court of Appeals for the Third Circuit. Important questions as to federal civil procedure are raised on this case affecting the orderly prosecution of civil matters throughout the country.

SUMMARY OF PETITION

This petition seeks review of the Third Circuit's affirmance of the orders of the Honorable Vincent P. Biunno, District Judge for the District of New Jersey. Said orders dismissed petitioners' complaint pursuant to Rule 37 of the Federal Rules of Civil Procedure for failure to comply with discovery requests and orders. This Court is asked to issue a writ of certiorari to the Third Circuit Court of Appeals in consideration of three basic issues:

(1) Whether the District Court abused its discretion in dismissing the complaint herein and whether the Court of Appeals erred in affirming said dismissal;

(2) Whether this Court's opinion in the case of *National Hockey League v. Metropolitan Hockey Club, Inc.*, ____ U.S. ____, 96 S. Ct. ____, 49 L. Ed. 2d 747 (1976) was improperly applied in the instant case or should be reconsidered by this Court in light of the facts and circumstances attendant herein;

(3) Whether the dismissal of the complaint constituted a denial of due process.

OPINIONS BELOW

The Third Circuit issued no opinion but rather affirmed based on the decision of the District Court. The relevant District Court orders of January 10, 1975, February 27, 1976, April 15, 1975 and January 8, 1976 dismissed the complaint herein for failure to comply with discovery orders. These orders and letter opinions are unreported and are reprinted in the Appendix hereto. Furthermore, annexed is the opinion of the Honorable Constance Baker Motley transferring the cause from the Southern District of New York to the District of New Jersey, as well as interim orders of the Third Circuit.

JURISDICTION

This action was commenced in 1973 in the United States District Court for the Southern District of New York based on diversity of citizenship and a controversy in excess of $10,000. The petitioners, members of a law firm located in Bangkok, Thailand, sought to recover legal fees for services allegedly performed for the respondent, a New Jersey corporation. Thereafter, the case was removed to the District of New Jersey pursuant to 28 U.S.C. §1406(a). Respondent then served petitioner with a Request for Production of Documents and a Notice to Take Oral Depositions of the petitioners. Further, depositions were scheduled. Because of various problems which will be discussed below, discovery could not be completed as rapidly as respondent would have liked. An order was entered directing discovery under threat of dismissal of the complaint. Unfortunately, this could not be completed within the time allotted and the complaint was dismissed. A timely appeal was taken to the Third Circuit but was dismissed on the court's own motion due to the fact that Judge Biunno had not entered a separate order pursuant to Rule 58 of the Federal Rules of Civil Procedure. A separate order was then entered and a timely appeal taken. Oral argument was held on February 24, 1977, and on March 14, 1977 the Court of Appeals for the Third Circuit entered a judgment-order affirming the District Court order pursuant to the opinion rendered below. This petition is being filed within 90 days of that denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a civil action should properly be dismissed when the failure to comply with discovery orders is admittedly due to geographic distances and the death and illness of counsel.

2. Whether such dismissal constitutes an abuse of discretion, particularly in light of the other remedies available to the court and the parties.

3. Whether the court below improperly applied the doctrine of *National Hockey League v. Metropolitan Hockey Club, Inc.*, ___ U.S. ___, 96 S. Ct. ___, 49 L. Ed. 2d 747 (1976).

4. Whether *National Hockey League v. Metropolitan Hockey Club, Inc., supra,* should be reconsidered in light of the potential prejudice and disorder it forebodes for civil litigation in general.

5. Whether the dismissal of the complaint constituted a violation of the Fifth Amendment to the United States Constitution in that the petitioners were denied due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 34 of the Federal Rules of Civil Procedure:

> "Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes
>
> (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).
>
> (b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons not parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."

Rule 37 of the Federal Rules of Civil Procedure:

"Rule 37. Failure to Make Discovery: Sanctions

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters

relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion

or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf

of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule of Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of

the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Subpoena of person in foreign country. A subpoena may be issued as provided in Title 28 U.S.C. §1783, under the circumstances and conditions therein stated.

(f) Expenses against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule."

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the Southern District of New York on July 25, 1973. The complaint alleged that the petitioners, members of a Thai

law firm, had been retained by the respondent, a New Jersey corporation, to handle a legal dispute involving International Pharmaceuticals, Ltd. The sum allegedly owing and due for these services was $20,149.85. The respondent appeared in this action and moved to dismiss the action for improper venue (28 U.S.C. §1406(a)), or in the alternative for an order directing transfer of the cause to the District of New Jersey pursuant to 28 U.S.C. §1404(a). The District Court (Constance Baker Motley, J.) took the latter approach and by opinion and order dated July 26, 1974, transferred the action to the District of New Jersey.

An answer was interposed and a Request for Production of Documents was served and filed on August 8, 1974. On September 9, 1974, respondent scheduled the depositions of Harvey Leve and William Quasha, the petitioners. In November, 1974, further depositions were scheduled by respondent to be taken of Somchit Boonpranes and Chamras Puakpong, employees of the petitioners' law firm. Invariably, all of the documents requested had to be transported from Thailand to the United States and the persons whose depositions had been requested also had to be brought in from that country. The estimated cost of such compliance represented approximately 40% of the petitioners' entire claim. Nevertheless, in December, 1974, some of the documents requested had been received by petitioners' counsel and these were immediately forwarded to respondent's counsel.

To compound the logistical problems faced by petitioners' counsel, Harold Schwartz, Esq., the attorney in charge of the pre-trial phase of the litigation, passed away suddenly in September, 1974. Scott Manley, Esq., another attorney and a member of the law firm of Saxe, Bacon, Bo[illegible] & [illegible]anley, thereafter assumed control of this case. In late December, 1974, Mr. Manley was forced to take a leave of absence from the law firm for medical reasons. This absence continued up to the time that Judge Biunno dismissed the complaint.

Thus the petitioners were faced with severe problems in complying with discovery. Documents had to be retrieved from Thailand, translated and then examined by petitioners' counsel. Unfortunately, due to unpredictable and uncontrollable circumstances, the staff of petitioners' counsel was rapidly depleted. Over and above this, the cost of the depositions requested by the respondent was prohibitive.

Against this backdrop, the following took place. On November 26, 1974, respondent moved for an order to compel petitioners to comply with the discovery requests or, in the alternative, for an order dismissing the complaint. By letter opinion and order dated January 10, 1975, Judge Biunno directed the documents requested to be produced by January 20, 1975, or objections to be filed by that date. Furthermore, the depositions were to go forward no later than January 30, 1975. Apparently the court was not aware of the physical infirmities which had befallen petitioners' counsel at this time, nor that there had been partial compliance as to producing documents.

Due to the strain placed on petitioners' counsel by virtue of the loss of two attorneys in rapid succession and the attendant need to rearrange personnel, discovery could not be completed by the assigned dates. Respondent thereafter moved to dismiss the complaint while petitioners sought to limit document production or extend the time for completion, and for an order vacating the notices to take oral deposition or for an order directing examination by written interrogatories. On February 27, 1975, the court denied petitioners' cross-motion and granted the motion to dismiss the complaint. However, the court stated that entry of the order would be withheld until March 24, 1975. The court stated that if discovery was completed by that time, the court would entertain a motion for reconsideration.

The problems which had befallen petitioners' counsel continued to plague them. The depositions did not go forward, but there was further substantial compliance with the demand

for document production. On March 24, 1975, counsel for the petitioners wrote to Judge Biunno to apprise him of the various problems which had befallen the petitioners, and merely requested that the dismissal of the complaint be "without prejudice." By letter opinion and order dated April 15, 1975, this request was denied. A timely notice of appeal was served and filed on May 14, 1975.

During the pendency of the appeal, the respondent submitted two motions to the Court of Appeals:

(1) to dismiss the appeal based on a failure to file a bond for costs pursuant to Rule 7 of the Federal Rules of Appellate Procedure, for failure to serve a statement of contents of appendix and statement of issues presented pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure: and

(2) to extend the time for respondent to file its brief and to quash certain portions of petitioners' brief and appendix. By order of the Third Circuit, dated September 4, 1975, these motions were referred to the panel to which the case was assigned. These motions became superfluous by virtue of the Court of Appeals' own motion which resulted in a dismissal of the appeal for the District Court's failure to comply with the "separate document" requirement of Rule 58 of the Federal Rules of Civil Procedure (November 20, 1975).

On January 8, 1976, Judge Biunno entered an order dismissing the complaint "with prejudice." A timely notice of appeal was filed. Argument was held before the Court of Appeals on February 24, 1977, and on March 14, 1977, a judgment order (without opinion) was rendered by the court (Kalodner, Adams and Hunter, Circuit Judges) affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The record herein demonstrates a case wherein the respondent (defendant) employed the full panoply of available tactics to prevent a valid law suit from being determined on the merits. An examination of the history of this cause reveals the tactics of the respondent:

(1) motion to dismiss or to change venue

(2) notice to produce documents

(3) notice to take oral depositions (first)

(4) notice to take oral depositions (second)

(5) motion to dismiss appeal

(6) motion to quash portions of brief and appendix

Not one of these techniques was in any way directed toward the underlying merits of the action, but were merely further dilatory tactics to hamper petitioners and to prevent the litigation from being determined on the merits and the petitioners from having their day in court. Any one of the questions raised herein merit the granting of certiorari.

I.

THE DECISION BELOW AND THAT OF THE DISTRICT COURT CONSTITUTED AN ABUSE OF DISCRETION.

As is evident from the above, severe pressures befell petitioners and their counsel when they attempted to comply with discovery. What does come through from the facts is that these difficulties were not of their own making. This, in and of

itself, should have resulted in less severe sanctions being imposed. The existence of these factors demonstrated that any failure to comply with discovery was not wilful. *Hyman v. American Export, Inc.*, 213 F.2d 221 (2nd Cir. 1954); *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970); *Vac-Air, Inc. v. John Mohr & Sons, Inc.*, 471 F.2d 231 (7th Cir. 1973).

Even assuming that respondent will argue that petitioners had every opportunity to comply with discovery, this does not answer the question. The loss of two attorneys in a relatively short time (three months) would disrupt the workings of any law firm. This is more particularly so when inter-continental litigation is being conducted. In the face of these adversities, the fact that there was substantial document compliance flies in the face of any finding of wilfulness on the part of the petitioners. Rule 37 of the Federal Rules of Civil Procedure offers multiple alternatives for a failure to comply with discovery. Any one of these could have been directed by the District Court or the Court of Appeals, short of dismissal on the merits, a concedely drastic remedy. *United States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352 (S.D.N.Y. 1966); *Linnear v. White*, 422 F.2d 864 (7th Cir. 1970); *Henson v. Michigan Mutual Liability Co.*, 275 F.2d 537 (5th Cir. 1960); *Vac-Air, Inc. v. John Mohr & Sons, Inc., supra; Dorsey v. Academy Moving & Storage, Inc., supra.*

The courts below failed to even consider the geographic and physical problems herein, but rather merely examined the question of whether or not there had been compliance with the requests and orders for discovery. Such a hard and fast determination, employed without flexibility, does not take into consideration the realities of the situation nor does it offer the parties a sufficient opportunity to complete discovery. Had a more realistic schedule been set up, compliance would have been forthcoming. For example, Judge Biunno's order of January 10, 1975, gave the petitioners ten days to complete document

production and twenty days to complete depositions. Considering that counsel had only recently become ill (late December, 1974), this time span was not only insufficient to complete discovery, but completion was, in effect, an impossibility.

II.

THE COURT BELOW IMPROPERLY APPLIED THE CASE OF *NATIONAL HOCKEY LEAGUE v. METROPOLITAN HOCKEY CLUB, INC.*, ___U.S. ___, 96 S. CT. ___, 49 L. ED. 2d 747 (1976), OR THIS CASE SHOULD BE RECONSIDERED BY THIS COURT.

At oral argument in the court below, the panel raised the issue of the applicability of *National Hockey League v. Metropolitan Hockey Club, Inc.*, ___U.S. ___, 96 S. Ct. ___, 49 L. Ed. 2d 747 (1976) to the instant case. In light of the fact that no written opinion was rendered by the Third Circuit, it is difficult to ascertain whether or not the *National Hockey* case played a large part in the court's consideration and determination of this matter. However due to the great emphasis and concern of the court as to that case, we must assume that it did.

A. The *National Hockey League* case is inapplicable.

As stated above, the panel was quite concerned with the applicability of the case of *National Hockey League v. Metropolitan Hockey Club, Inc., supra,* as to the instant case. As this Court is aware, *National Hockey* dealt with the failure of the respondents to comply with pre-trial discovery. It is our contention the *National Hockey* is limited to its facts and is inapplicable to the instant case. In that case, the sole issue was whether or not the respondents' excuse for failure to comply with written interrogatories was legally sufficient so as to cause the District Court's dismissal to be deemed an abuse of discretion.

In *National Hockey* (a 4-2 decision), the respondents failed to complete discovery by answering interrogatories during a *seventeen* month period. The only excuses offered were that neither party pressed discovery until a consent decree was entered, that there had been a change of counsel and that some unidentified difficulty prevented the obtaining of certain information. When this is juxtaposed against the facts of this case, the inapplicability of *National Hockey* becomes even more apparent. In the instant matter, petitioners were faced with the death and illness of the two attorneys in charge of the litigation, had to deal with a severe geographic situation, and, perhaps most significantly, had been ordered to expend 40% of the entire claim solely for airfare to produce certain individuals for depositions. The two situations are certainly not analogous, especially in light of the failure of the District Court to permit the petitioners to submit to any alternative discovery. (See: *Vac-Air, Inc. v. John Mohr & Sons, Inc., supra; Hyman v. American Export, Inc., supra; Endte v. Hermes Export Corp.*, 20 F.R.D. 162 (S.D.N.Y. 1957); *Chemical Specialities Co., Inc. v. Ciba Pharmaceutical Products, Inc.*, 10 F.R.D. 500 (D.N.J. 1950). Had this suggested method been available, as petitioners suggested, discovery could have gone forward and the matter completed. We submit that this alternative was much more desirable than an outright dismissal of petitioners' claim. In light of this suggestion and the clearly distinguishing facts herein as opposed to *National Hockey*, the Court of Appeals should have reversed the District Court and held that dismissal "on the merits" was an abuse of discretion.

B. This Court should reconsider its holding in *National Hockey*.

Assuming that *National Hockey* is deemed to be applicable to the instant case, we respectfully submit that this Court should reconsider and recall its decision therein due to the severe prejudice which that ruling forebodes. The federal courts will now apparently dismiss a viable cause of action merely due to the passage of time in which pre-trial discovery is pending

without regard to the attendant facts and circumstances. It is axiomatic that a trial on the merits is preferable to summary dismissal. However, the ominous portents of *National Hockey* would militate against this. A litigant could so thoroughly inundate the opposition with discovery requests as to make compliance virtually impossible. Although the aggrieved party could see judicial protection, the benefits of this are questionable since a party (and rightly so) is entitled to full and complete disclosure. In such a situation the hint of wilfulness would be lacking, but a court might feel constrained to punish the non-disclosing party under the aegis of *National Hockey*.

Almost twenty years ago this Court stated:

> ". . . we think that Rule 37 [of the Federal Rules of Civil Procedure] should not be construed to authorize dismissal of this complaint because of petitioner's non-compliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not willfulness, bad faith or any fault of the petitioner." *Societe Internationale v. Rogers,* 357 U.S. 197, 212, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) (footnote omitted).

Not only does the *National Hockey* decision deviate from this long-standing rule, but it also effectively limits and hampers further application of the well-accepted, less severe alternatives to dismissal under Rule 37. *National Hockey* should be recalled or limited to the particular facts upon which it is based.

III.

THE DISMISSAL OF THE COMPLAINT CONSTITUTED A DENIAL OF DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The authority of a trial court to dismiss an action for failure to comply with a pre-trial order of discovery is unquestionably limited by the Fifth Amendment. This has been so determined by this very Court:

> "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey v. Elliott, 167 U.S. 409, 42 L ed 215, 17 S.Ct. 841, and Hammond Packing Co. v. Arkansas, 212 U.S. 322, 53 L ed 530, 29 S.Ct. 370, 14 Ann Cas 645. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules, Rule 37, 28 USC (1952 ed.), p. 4325.
>
> In Hovey v. Elliott (US) supra, it was held that due process was denied a defendant whose answer was struck, thereby leading to a decree pro confesso without a hearing on the merits, because of his refusal to obey a court order pertinent to the suit. This holding was substantially modified by Hammond Packing Co. v. Arkansas (US), supra, where the Court ruled

> that a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order. *The Hovey Case was distinguished on grounds that the defendant there was denied his right to defend 'as a mere punishment'; due process was found preserved in Hammond on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence '. . . was but an admission of the want of merit in the asserted defense.' 212 US at 350, 351. But the Court took care to emphasize that the defendant had not been penalized '. . . for a failure to do that which it may not have been in its power to do.' All the State had required 'was a bona fide effort to comply with an order . . ., and therefore any reasonable showing of an inability to comply would have satisfied the requirements . . .' of the order.* 212 US at 347" *Societe Internationale v. Rogers, supra,* at 209-210. (Emphasis supplied.)

We would submit that the reasoning of *Hovey v. Elliott,* 167 U.S. 1409, 17 S. Ct. 841, 42 L. Ed. 215 (1895) is controlling in the instant case rather than *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 295 S. Ct. 370, 58 L. Ed. 370 (1908). In *Hovey,* as in this case, the pleading was dismissed "as a mere punishment," rather than on the merits. In *Hammond,* the dismissal was based on a presumption that the failure to comply was an admission of the lack of merit of the pleaded defense. Nowhere in the instant case is there such a determination. As such, due process has not been accorded to the petitioners.

CONCLUSION

For these various reasons, certiorari should be granted to review the Third Circuit's judgment order.

Respectfully submitted,

s/ Roy R. Kulcsar

SAXE, BACON & BOLAN, P.C.
Attorneys for Petitioners

APPENDIX

OPINION OF THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARVEY A. LEVE and WILLIAM H. QUASHA, d/b/a QUASHA LAW OFFICE,

Plaintiffs,

-v-

SCHERING CORPORATION,

Defendant.

73 CIV. 3271
Filed
U.S. District Court
Jul. 29 10:45 AM '74
S.D. of N.Y.
MICROFILM
Jul. 29, 1974

APPEARANCES

SAXE, BACON, BOLAN & MANLEY
By: Roy M. Cohn
39 East 68th Street
New York, New York 10021

Attorneys for Plaintiffs

WILLIAM G. BECKER
36 West 44th Street
New York, New York 10036

Attorney for Defendant

Opinion of the Southern District of New York

CONSTANCE BAKER MOTLEY, D.J.

Defendant moves to dismiss this diversity action for improper venue, 28 U.S.C. §1408(a), or, in the alternative, to transfer the action to the District of New Jersey pursuant to 28 U.S.C. §1404(a).

Where a defendant corporation is "doing business" for purposes of 28 U.S.C. §1391(c) is governed by federal law in this Circuit. In *MacInnes v. Fontainebleau Hotel Corp.*, 257 F.2d 832 (2d Cir. 1958), it was held that mere solicitation is not sufficient to constitute doing business. While the question there was one of personal jurisdiction, the court's decision was guided by federal law.

Of course, where there has been some additional activity, besides mere solicitation, such as continuous shipment of goods into the district and "authority to receive payment in money, check, or draft" a different result has been reached. *International Harvester Company of America v. Commonwealth of Kentucky*, 234 U.S. 579 (1914). However, in the instant case, the affidavits submitted in connection with the motion do not suggest any such additional activity.

Although the court has the power to dismiss the action for improper venue, 28 U.S.C. §1406(a) permits transfer, if it be in the interest of justice, to any district in which the action could have been brought. There being no showing that plaintiff chose the wrong forum for purposes of abuse or harassment, transfer of the action is the more appropriate remedy.[1] 1 J. Moore *Federal Practice* ¶0.146[5] (1972).

1. Of course, if the court lacked personal jurisdiction over defendant, the only available remedy would be dismissal. However, defendant has stated that, with respect to this motion, it does not argue that the court lacks personal jurisdiction. (Defendant's Memorandum of Law, p. 4). Any objection to the court's personal jurisdiction has, accordingly, been waived. Rule 12(h)(1), Fed. R. Civ. P.

(Cont'd)

The action is accordingly transferred to the District of New Jersey.

Dated: New York, New York

July 26, 1974

SO ORDERED

s/ Constance Baker Motley

ORDER OF JANUARY 10, 1975

UNITED STATES DISTRICT COURT
Room 411, U.S. Post Office Building
Newark, New Jersey 07102

Vincent P. Biunno
Judge

LETTER OPINION AND ORDER

Re: Leve, et al. v. Schering Corp. Civil 74-1198

Defendant has moved to compel the production of documents and to compel the appearance of plaintiffs for deposition. The request for production was filed August 6, 1974 and the notice to depose was filed September 9. According to the affidavit of defendant's counsel, plaintiffs' counsel informed defendant that the notice to produce documents had not been received. Defendant therefore adjourned the date set for depositions pending receipt of the documents which to date have not been received.

(Cont'd)

Defendant, by requesting, in the alternative, that the action be transferred to the District of New Jersey, 28 U.S.C. §1404(a), has acknowledged that the action might have been brought in New Jersey.

Order of January 10, 1975

The court appreciates what may be a problem in producing the documents expeditiously. Plaintiffs are two attorneys from Thailand claiming compensation for services rendered defendant. No doubt many of the documents are in that nation. Plaintiffs, however, have not answered the moving papers to shed any light on the problem. Nevertheless, the notice is now months old.

Plaintiffs are to produce or otherwise object to the documents requested in the notice of August 6, 1974 by January 20, 1975 and are to appear for depositions no later than January 30, 1975, unless otherwise modified with leave of court. If plaintiffs fail to comply, the court will entertain a notice on short motion by defendants.

SO ORDERED.

January 10, 1975

s/ Vincent P. Biunno, U.S.D.J.

Original to Clerk
xc: Mathew Farley, Esq.
Nicholas E. Caprio, Esq.

ORDER OF FEBRUARY 27, 1975

UNITED STATES DISTRICT COURT
Room 411, U.S. Post Office Building
Newark, New Jersey 07102

Vincent P. Biunno
Judge

LETTER OPINION AND ORDER

Re: Leve et al v. Schering Civil 74-1198

Order of February 27, 1975

On January 10, 1975 an order was entered on defendant's motion, directing plaintiffs to produce or otherwise object to defendant's request for production of August 6, 1974. This was to be accomplished by January 20, 1975. Plaintiffs were also ordered to appear for depositions not later than January 30, 1975. On failure of plaintiffs to comply, defendant was authorized to move to dismiss on short notice.

Plaintiffs have not complied with the order, and defendant has filed motion to dismiss on short notice, returnable February 10, 1975. Plaintiffs have countered with a motion filed that day and returnable February 24, 1975, seeking an order to limit the scope of the August 6, 1974 request for production (or granting an extension of time to complete the production); and an order vacating the defendant's notice of oral deposition (or for an order to examine by written interrogatories instead), and an order staying the oral depositions noticed to be commenced by or before January 30, 1975.

This disposition will deal with both motions. The motion of plaintiffs will be taken up first.

The affidavit and exhibits submitted for plaintiff are inadequate to support any request to limit the scope of the request for production. It is now nearly 7 months since the request was made, and very little seems to have been supplied. Even that which was supplied was only produced after defendant's first motion was made.

Beyond that, plaintiffs have not made objections in compliance with F.R.Civ.P. 34(b). They have ignored the fact that the obligation to produce now rests on the order of January 10, 1975, entered to enforce the request, rather than on the request itself. That order gave them until January 20, 1975 within which to produce or object, and they did neither within the time limited. Thus, the order stands.

Order of February 27, 1975

A point is made of the time needed for mail in transmitting the documents from Thailand, where plaintiffs are. A phone inquiry of a local office of Pan Am reveals that packages sent over their service between New York and Thailand are available for pick-up at destination within a maximum of 5 days from the time of delivery to Pan Am's cargo service office. For the first 100 lbs., the charge is $2.56 a pound, and above that, $1.96 a pound; the minimum charge per shipment is only $22. Thus, it appears that there are inexpensive means for prompt shipment, while the nearly 7 months since the request would have been enough to deliver by sailing vessel around the Horn.

The argument on scope (aside from the failure to comply with the Rule noted) amounts to no more than plaintiffs' view of what defendant needs to prepare a defense. That evaluation is to be made by defendants, not by plaintiffs.

On the matter of depositions, plaintiffs also pretend they are dealing with a notice, when in fact they are dealing with an order, and the order still stands. The argument advanced (aside from that) is without substance since it is plain that defendant's deposition discovery is designed to elicit information with the requested documents as reference. To attempt that kind of inquiry by written interrogatories is certain to be essentially impossible as well as wasteful of time and effort.

Defendant's motion to dismiss has not been met effectively. Plaintiffs were on notice by the terms of the order of January 10, 1975 what the risk of non-compliance would be. They chose not to comply with it. Had they shown, by January 20, 1975, that the requested documents were shipped and on the way, or had they complied with F.R. Civ. P. 34(b) by way of objection, an application for an order modifying the schedule could have been made with a high likelihood that it would be granted. This, of course, was not the case.

Order of February 27, 1975

Accordingly, defendant's motion will be granted, and the complaint is dismissed. The dismissal will take effect and will be entered on March 24, 1975. If, before that time, all the items requested have been produced and the depositions concluded, an application for reconsideration will be entertained, but with no prediction of its outcome. The parties will keep in mind, as well, that a claim for legal services based on a contingent fee arrangement is always subject to the closest scrutiny, and that the attorney advancing such a claim is obliged to make a full and complete disclosure to the client.

SO ORDERED.

February 27, 1975

s/ Vincent P. Biunno,
U.S.D.J.

Original to Clerk
xc: Nicholas E. Caprio, Esq.
Matt Farley, Esq.

ORDER OF APRIL 15, 1975

UNITED STATES DISTRICT COURT
Room 411, U.S. Post Office Building
Newark, New Jersey 07102
(201) 645-3730

Vincent P. Biunno
Judge

LETTER OPINION AND ORDER

Re: Leve et al v. Schering, Civil 74-1198

Order of April 15, 1975

Plaintiffs have not taken advantage of the opportunity provided by the Letter Opinion and Order of February 27, 1975 to produce the documents requested and to conclude the depositions noticed.

Instead, counsel wrote the court on the last day of the period allowed, March 24, 1975, with an outline of personnel difficulties arising from the death in September, 1974, of an associate working on the case, and from a medical leave in December, 1974 for a partner who took on his burdens. They also take note of the expense of air fare involved in the depositions. On this basis they request that the dismissal called for in the February 27, 1975 order be expressed to be without prejudice.

The court finds no basis for granting this informal request. The material now submitted was known long ago and never presented until time had run out. Also, if the personnel problems were so serious, no explanation is given of the failure to turn the case over to someone else. Plaintiffs' interests required that this matter be given attention, and if present counsel was unable to do so, he had a professional obligation to see that someone else who could do so be engaged.

SO ORDERED.

April 15, 1975

s/ Vincent P. Biunno,
U.S.D.J.

Original to Clerk
xc: Nicholas E. Caprio, Esq.
Saxe, Bacon, Bolan & Manley, Esqs.
Matt Farley, Esq.

LETTER OPINION OF AUGUST 22, 1975

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 75-1658

August 22, 1975

HARVEY A. LEVE and WILLIAM H. QUASHA, d/b/a Quasha Law Office,

Appellants

vs.

SCHERING CORPORATION

(D.C. Civil No. 74-1198)

Present: VAN DUSEN, ADAMS and HUNTER, Circuit Judges.

1. Appellee's motion to dismiss appeal pursuant to Rule 7, F.R.A.P., for failure to file Bond for Costs, and pursuant to Rule 30(b) F.R.A.P., for failure to serve Statement of Contents of Appendix and Statement of Issues Presented, and pursuant to Rule 3(a) F.R.A.P., for failure to file a timely Notice of Appeal, with Affidavit of Matt Farley, Esquire, and Brief in Support of Motion,

2. Appellee's motion for leave to extend time to file brief pending the Court's decision on Motion to Dismiss, and to quash certain portions of Appellants' brief and appendix, with Affidavit of Matt Farley, Esquire,

Letter Opinion of August 22, 1975

3. Appellants' affidavit in opposition to appellee's motion to quash portion of appellants' brief and appendix in the above listed for Tuesday, September 2, 1975.

Respectfully,

s/ T.F. Quinn
Clerk

enc.
fm

The foregoing Motion to dismiss appeal is referred to the panel to which the case is assigned for disposition on the merits, without prejudice to the right of the appellants to apply, under F. R. A. P. 4, to the district court for an extension of time to May 14, 1975, within which to file a notice of appeal on the basis of their alternative contention that the February 27 letter opinion entered an order with an effective date of March 24, 1975, even if it should be determined that the April 15, 1975, order is not a final order 28 U.S.C. §1291.

By the Court,

s/ Van Dusen
Judge

Dated: September 4, 1975

ORDER OF NOVEMBER 20, 1975

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1658

HARVEY A. LEVE and WILLIAM H. QUASHA d/b/a QUASHA LAW OFFICE,

Appellants

v.

SCHERING CORPORATION

(Civil Action No. 74-1198, D.N.J.)

Present: SEITZ, Chief Judge, GIBBONS and ROSENN, Circuit Judges.

ORDERED that the above-captioned appeal is dismissed without prejudice for lack of an appealable judgment because of the district court's failure to comply with the "separate document" requirement of F.R.Civ.P. 58

Further ORDERED that the present record may be used if a timely appeal is taken after the entry of a judgment complying with F.R.Civ. P. 58.

By the Court,

s/ C.J. Seitz
Chief Judge

Attest:

s/ Thomas F. Quinn
Clerk

Dated: November 20, 1975

ORDER OF JANUARY 8, 1976

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil 74-1198

Filed
Jan. 9, 1976
4:30 P.M.
A.W. Locascio

HARVEY A. LEVE and WILLIAM H. QUASHA, d/b/a QUASHA LAW OFFICE,

Plaintiffs,

vs.

SCHERING CORPORATION,

Defendant.

FINAL JUDGMENT

For the reasons set forth in the Letter Opinion and Order dated February 27, 1975, and the Letter Opinion and Order dated April 15, 1975, defendant's motion to dismiss the complaint with prejudice is granted, and it is, on this 8th day of January, 1976,

ORDERED that final judgment be entered in favor of defendant and against plaintiffs.

s/ Vincent P. Biunno,
U.S.D.J.

Original to Clerk
xc: Nicholas E. Caprio, Esq.
Matt Farley, Esq.

ORDER OF MARCH 14, 1977

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-1355

HARVEY A. LEVE and WILLIAM H. QUASHA, d/b/a Quasha Law Office,

Appellants

v.

SCHERING CORPORATION

On Appeal from the United States District Court for the District of New Jersey
C.A. No. 74-1198

Argued February 24, 1977

Before: KALODNER, ADAMS and HUNTER, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

Order of March 14, 1977

BY THE COURT:

s/ A. Adams
Circuit Judge

ATTEST:

s/ Thomas F. Quinn
Thomas F. Quinn
Clerk

Dated: March 14, 1977